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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GREGORY BURKE, Plaintiff and Appellant, v. NEWPORT-MESA UNIFIED SCHOOL DISTRICT et. al., Defendants and Respondents.	G058492 (Super. Ct. No. 30-2016-00882380) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Layne H. Melzer, Judge. Reversed and remanded.

Gregory Burke, in pro. per., for Plaintiff an Appellant.

Lynberg & Watkins and Courtney L. Hylton for Defendants and Respondents.

* * *

Gregory Burke appeals from the order granting a special motion to strike his complaint against Newport-Mesa Unified School District, Jennifer Hays and Sean Boulton (collectively, the District) pursuant to Code of Civil Procedure section 425.16 (the anti-SLAPP law).[1] Burke's complaint states a cause of action for intentional infliction of emotional distress arising from an alleged retaliatory response by defendants to Burke's request for review of claimed misconduct by his son's swim club coach pursuant to the club's written code of conduct.

The trial court granted the motion, agreeing with the District's contention that the response, which accused Burke's teenage son of engaging in sexual abuse of other swim team members and terminated his membership in the club, involved an "issue of public interest," and was thus a protected communication under the anti-SLAPP law. However, in an unpublished decision in the consolidated case of *Burke v. Newport Beach Aquatics, Inc.* (Feb. 6, 2020, G057048 (*Burke I*)), we concluded that the same accusation at issue in this case did not qualify as an issue of public interest. We incorporate and adopt that reasoning here as well.

The District acknowledges that earlier opinion, and thus now contends the trial court's order should be affirmed on the basis of its alternative contention, i.e., that the accusatory communication is protected by the anti-SLAPP law because it was made "in connection [with] an 'official proceeding"'—referring to the "proceeding" Burke attempted to initiate against the coach pursuant to the swim club's code of conduct. We cannot agree.

In making its argument, the District expressly assumes the allegations of Burke's complaint are true. One of those allegations is that the false accusation against Burke's son was a pretext to terminate his membership on the team, and thus "to silence"

[1] Burke's appeal also encompasses the court's subsequent order awarding fees and costs against him.

Burke's claims about the coach's misconduct. There is no allegation that the code of conduct proceeding Burke sought to initiate with the swim club actually occurred—nor does the District offer any evidence to suggest it did.

Moreover, even if we assumed that the code of conduct proceeding took place for purposes of the anti-SLAPP law, it would not alter our conclusion. The anti-SLAPP law protects statements made in connection with an "official proceeding authorized by law." (Code Civ. Proc., § 425.16, subd. (e).) A private swim club's meeting conducted pursuant to its own procedural rules does not qualify as such an "official proceeding." Consequently, the trial court erred in concluding that the e-mail accusing Burke's son of sexual abuse qualified for protection under the anti-SLAPP law. We therefore reverse the order granting the District's motion to strike as well as its related order awarding attorney fees and costs.

Burke also challenges the trial court's order denying his motion for leave to file a fourth amended complaint. Because the court's denial of leave was based solely on its erroneous grant of the District's special motion to strike under the anti-SLAPP law, we reverse that order as well, and remand the issue to the trial court for consideration on the merits.

FACTS

In October 2016, Burke filed suit against Newport Beach Aquatics, Inc. (the swim club), numerous individuals affiliated with the swim club, and Doe defendants, seeking damages for intentional infliction of emotional distress and breach of contract. Burke's operative third amended complaint alleges that the swim club and Newport Harbor High School have "an arrangement," whereby the swim club "hires and pays the salaries for the aquatic coaches for both the high school and [the] club in exchange for exclusive use of the high school pool for its swim and water polo programs," and that the

high school "gives total control of its aquatic program to [the club] and in doing so, [the club] is able to dictate who coaches for [the high school]."

In February 2019, Burke amended his complaint to identify Newport-Mesa Unified School District as "Doe 10," and to identify Sean Boulton and Jennifer Hays (two employees of the school district) as "Doe 8" and "Doe 9" respectively."

Burke's complaint alleges he suffered extreme emotional distress as a consequence of defendants' alleged response to his complaint that the swim team coach, Trevor Basil, was subjecting his son to harassment.

According to the complaint, Burke's son, who swam competitively at Newport Harbor High School, and also for the related club team, was subjected to harassment by Trevor Basil, the head coach of both swim teams. Burke complained to the coach about his misconduct, and the coach allegedly responded by intensifying his harassment of Burke's son.

Then, "[o]n November 14, 2014 at 9:51 a.m., [Burke] sent an email requesting a review of the harassment pursuant to the Code of Conduct signed by all of the swimmers and parents. The written Code of Conduct requires a hearing consisting of three members of the Board of Directors with the parent and swimmer given the opportunity to be present and offer testimony and evidence. The Head Coach is also present in an advisory role. Within one week following the hearing, the Disciplinary Committee mails the decision to the parent and swimmer by certified mail."

Burke alleged that later that same evening, in response to his e-mail, the swim club and its board of directors sent him "a letter terminating his son's membership from the swim program under the pretext of 'sexual misconduct' they claimed occurred at the last two swim meets." He alleges that defendants "falsely accuse[d his] son of sexual misconduct to silence [his] complaints and avoid an investigation by the high school into the conduct of Coach Basil."

Pursuant to Burke's complaint, defendants allegedly "intended to harm [him] with the false accusation, confident that by maligning his son [he] would be so mentally and emotionally shattered that he would simply walk away and stop his complaints."

However, despite alleged threats by a member of the swim club's board of directors to "get the Newport Beach Police Department to investigate the claims of sexual harassment against [his] son, which would end his son's chances of getting into college," Burke allegedly "looked further into why the Defendants would make such a patently *false* accusation, and, in his investigation, discovered that [the swim coach] had been sending lewd and inappropriate text messages [to] some of the male swimmers . . . ." It was allegedly as a consequence of that revelation that the swim club's coach was forced to resign and the swim club was "completely dissolved."

In March 2019, Burke filed a motion for leave to file a fourth amended complaint (FAC). In his FAC, Burke sought to add additional allegations against various defendants, including intentional wrongdoing, statutory violations, and negligent hiring.

The day after Burke filed his motion for leave to amend, the District filed a special motion to strike the third amended complaint pursuant to the anti-SLAPP law. The District argued that Burke's claim for intentional infliction of emotional distress arose out of the e-mail accusing his son of engaging in sexual abuse and terminating his membership in the swim club. The District then asserted the e-mail qualified for protection under the anti-SLAPP law because the e-mail addressed an issue of '"public interest"' and because it was made before or in connection with an '"official proceeding."'

The trial court continued the hearing date on Burke's motion for leave to file his FAC, scheduling it to be heard on the same date as the District's special motion to strike. In its ruling on that motion, the court first determined that the e-mail accusing Burke's son of sexual misconduct concerned an "issue of public interest" and was thus

protected under the anti-SLAPP law. The court then concluded that Burke had failed to demonstrate a probability of success on the merits of his case. The court therefore granted the motion. The court next ruled Burke's motion for leave to amend his complaint against the District was "moot" in light of the ruling on the District's special motion to strike. As the court explained, "there is no right to have a motion to amend heard and decided before a ruling on a pending anti-SLAPP motion." (Italics omitted.)

At a subsequent hearing the court awarded the District $11,075 in attorney fees and costs as a consequence of its successful motion to strike the complaint pursuant to the anti-SLAPP law.

DISCUSSION

1. *The Anti-SLAPP Law*

The anti-SLAPP law provides a summary mechanism to test the merit of any claim arising out of a defendant's protected speech or petitioning activities. It authorizes courts to strike any cause of action which falls within the statute's purview, if the plaintiff cannot demonstrate a probability of prevailing on it.

"The anti-SLAPP law was enacted 'to protect nonprofit corporations and common citizens "from large corporate entities and trade associations" in petitioning government.' [Citation.] Attempting to protect against 'lawsuits brought primarily to chill' the exercise of speech and petition rights, the Legislature embedded context into the statutory preamble, 'declar[ing] that it is in the public interest to encourage continued participation in matters of public significance.'" (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 143 (*FilmOn.com*).)

"Because our 'primary goal is to determine and give effect to the underlying purpose of' the anti-SLAPP statute" we will "liberally extend the protection of the anti-SLAPP statute where doing so would 'encourage continued participation in

matters of public significance' but withhold that protection otherwise." (*FilmOn.com, supra*, 7 Cal.5th at p. 154.)

When a party moves to strike a complaint on the basis of the anti-SLAPP law, the court engages in a two-step process in determining whether a defendant's motion to strike should be granted. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute." (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53.)

If the court finds the defendant has made that required showing, the burden shifts to the plaintiff to demonstrate "there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1); *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.)

We review an order made pursuant to the anti-SLAPP law on a de novo basis. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 ["Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal"].)

2. *The Protected Activity Prong*

The anti-SLAPP law applies to "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." (Code Civ. Proc., § 425.16, subd. (b)(1).)

The statute defines an '"act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue"' to include specific categories of speech and petitioning activities, including

(1) any statements or writings made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any statements or writings made in connection with an issue under consideration or review by any such body or official proceeding; (3) any oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest. (Code Civ. Proc., § 425.16, subd. (e)(1-3).)

In what is sometimes referred to as a "catchall provision" (*FilmOn.com, supra*, 7 Cal.5th at p. 144; *San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, 101), the anti-SLAPP law also applies to "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e)(4)).

In *Burke I*, we concluded that the allegation of sexual abuse against Burke's son did not qualify as an issue of public interest for purposes of that "catchall provision."

3. *Existence of an Official Proceeding*

Acknowledging our ruling in *Burke I*,[2] the District now contends that the e-mail sent to Burke qualifies for protection under the anti-SLAPP law because it was made either "before [an] official proceeding authorized by law" or "in connection with an issue under consideration or review by [any such] official proceeding " (Code Civ. Proc., § 425.16, subd. (e)(1-2).) The District suggests that even if the false accusation against

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[2] The District makes a brief effort to argue with our earlier conclusion, relying on the Supreme Court's statement in *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 892, that '"[n]o extensive discussion is needed to establish the fundamental public interest in a workplace free from the pernicious influence of sexism."' But because that reference to workplace issues is entirely irrelevant to our analysis in *Burke I*, the District apparently felt compelled to alter the language used by the court to add the bracketed phrase "and schools" after the word "workplace." We are rarely persuaded by such tactics. And so it is here.

Burke's son was in reality an effort to thwart Burke's attempt to initiate a club proceeding against its swim coach, it is nonetheless protected because "section 425.16 (e)(2) still protects communications [that are] 'preparatory to,' 'in anticipation' or in furtherance of official proceedings. (*Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 711.)"

The District's theory seems to be that Burke himself initiated the relevant "proceeding" when his "letter was delivered to the high school's principal," and that "[c]onsequently, the subject letter, issued in response to [Burke's] complaint is likewise part of that proceeding as well." The District relies on *Lee v. Fick* (2005) 135 Cal.App.4th 89 (*Lee v. Fick*), for the proposition that a parent's written complaint to school officials about an athletic coach, in an effort to have the coach fired, initiates a "proceeding" for purposes of the anti-SLAPP law, no matter how informal the ensuing proceeding proves to be.

We agree with the analysis in *Lee v. Fick*, but this case is distinguishable. First, contrary to the District's assertion, Burke does not allege that his initial e-mail complaining about the swim coach's harassment of his son was "delivered to the high school's principal." Although Burke does not identify the individual recipient(s) of his e-mail, he describes that e-mail as seeking a review of the coach's harassment pursuant to the *swim club's* written code of conduct, which required a hearing before three members of the swim club's board of directors. Burke then alleges that the response he received that same evening, accusing his son of sexual misconduct and terminating his membership in the swim club, came from representatives of the *swim club*. Finally, Burke alleges the *swim club* representatives responded as they did because they wanted "to avoid an investigation by the high school into the conduct of Coach Basil." These allegations do not support the inference that Burke's e-mail was delivered to the high school principal or that it otherwise qualified as an effort to initiate an "official proceeding" by the high school itself into his allegations of harassment by the coach.

Because the only proceedings that trigger speech protections under the anti-SLAPP law are "official proceeding[s] *authorized by law*" (§ 425.16, subd. (e)(1), (2), italics added), Burke's attempt to initiate a review under the private swim club's written code of conduct differs significantly from the school board review sought by the parents in *Lee v Fick.* Indeed, as the appellate court in that case explained, the parents' complaint qualified for anti-SLAPP protection under the rule that "communications *to an official agency* intended to induce the agency to initiate action are part of an 'official proceeding.'" (*Lee v. Fick, supra,* 135 Cal.App.4th at p. 96 (italics added); see *FilmOn, supra,* 7 Cal.5th at p. 144 ["the Legislature "'equated a public issue with the *authorized official proceeding* to which it connects,'" effectively defining the protected status of the statement by the context in which it was made"].) Here, we are not convinced the private swim club proceedings sought by Burke in his e-mail qualified as official proceedings "authorized by law."[3]

Lee v. Fick is also distinguishable because the offending communication in that case was the parents' complaint about the coach—i.e., the effort to initiate the official proceeding—rather than a subsequent communication designed to thwart it. The court in *Lee v. Fick* reasoned that the complaint itself was automatically protected by the anti-SLAPP law, no matter what happened subsequently. Here, in contrast, the cause of action at issue arises out of a subsequent communication to a private entity, rather than the initiating complaint itself.

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[3] The District does assert that Burke has alleged the District "'authorized' the sending of the email as well as [Burke's] son's termination from the swim club for sexual misconduct," and points out that he also alleged the District "'conspired, joined and participated' with the other defendants 'in the conduct herein alleged.'" However, none of that suggests the District authorized the swim club's code of conduct proceeding that Burke sought to initiate in his e-mail. Moreover, even if the District—either properly or improperly—authorized the swim club to conduct such proceedings in accordance with the club's own rules, that would not establish that the proceeding was *authorized by law*.

That distinction is significant because there is nothing in our record to suggest that the proceeding Burke sought to initiate ever happened. Instead, as Burke specifically alleges, his request to initiate that proceeding was intentionally preempted by the response terminating his son's membership in the swim club.

And because the provisions of the anti-SLAPP law relied upon by the District expressly require that the protected statement be one that was made "before" the body conducting the official proceeding (Code Civ. Proc., § 425.16, subd. (e)(1)), or "in connection with an issue under consideration" in that proceeding (Code Civ. Proc., § 425.16, subd. (e)(2)), that protection cannot be established if the relevant body was never convened and the issue was never "under consideration."

Finally, we return to the District's concession that "[f]or purposes of this appeal, [it] assume[s] the truth of [Burke's] allegations." When we engage in that same assumption, we must assume the swim club's response to Burke's e-mail seeking review of the coach's purported harassment of his son was an attempt to quash that requested proceeding by making a false allegation of sexual misconduct against the teenager. We must also adhere to the Supreme Court's recent direction that we "liberally extend the protection of the anti-SLAPP statute where doing so would 'encourage continued participation in matters of public significance,' but withhold that protection otherwise." (*FilmOn.com, supra*, 7 Cal.5th at p. 154.)

Applying that rule, we conclude that the e-mail giving rise to Burke's complaint is not entitled to the protection of the anti-SLAPP law. As a result, we reverse the trial court's order granting the District's special motion to strike. We also reverse the court's subsequent order granting an award of attorney fees and costs to the District as the prevailing party on that motion.

4. *Motion for Leave to File Fourth Amended Complaint*

As noted above, the trial court denied Burke's motion for leave to file a fourth amended complaint against the District in the same ruling in which it granted the

District's anti-SLAPP motion. The court found that the motion for leave to amend was moot in light of the order granting the anti-SLAPP motion.

Because we are reversing that anti-SLAPP ruling, the motion for leave to amend is no longer moot. We consequently reverse the court's order denying leave to amend on that basis. We remand that issue to the trial court for consideration on the merits.

DISPOSITION

The order granting the District's special motion to strike the complaint pursuant to the anti-SLAPP law and the related order granting the District an award of attorney fees and costs as prevailing party on that motion are both reversed. The court's order denying Burke leave to file a fourth amended complaint is also reversed, and the issue is remanded to the trial court for further proceedings in light of this opinion. Burke is to recover his costs on appeal.

GOETHALS, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.